

State Of Wisconsin DIVISION OF HEARINGS AND APPEALS

Application of Waterboard Warriors, Inc. for a Permit to Place a Ski Jump and for a Permit to Place Two Performance Platforms on the Bed of the Fox River, Village of Wrightstown, Brown County, Wisconsin

Case Nos.: 3-NE-00-0275LF

3-NE-01-0078

3-NE-01-0079

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Waterboard Warriors, Inc., c/o Rob Harris, President, P. O. Box 11532, Green Bay, WI, 54307, applied to the Department of Natural Resources for a permit for a water ski jump in the Fox River. The dimensions of the proposed water ski jump are 14 feet wide by 20 feet long, extending 2 feet below to 5 feet above the water surface. Four concrete and steel anchors would hold the water ski jump in place. The water ski jump would be placed in the river 150 feet from the shoreline of Brown County Park in Wrightstown. Two large platform structures would be placed on the bed of the Fox River. The main performance platform is 20 feet eight inches wide and 32 feet 2 inches long. A second landing platform is 50 feet wide and 26 feet long.

On July 7, 2000, a notice was published which stated that unless written objection was received within 30 days the Department might make a decision on the application without a hearing. Several timely objections were filed. On April 13, 2001, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on May 1, 2001, at Green Bay, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. On May 30, 2001, the Division was advised that the parties requested time to pursue settlement of the matter prior to issuance of a decision. On June 13, 2001, Attorney Robert Gagan withdrew the request to hold the decision in abeyance.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Waterboard Warriors, Inc., by

Attorney Robert Gagan 716 Pine Street Green Bay, WI 54301 Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott P. O. Box 7921 Madison, WI 53707-7921

David and Sue Seymour 743 Park Street Wrightstown, WI 54180

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FINDINGS OF FACT

- 1. Waterboard Warriors, Inc., c/o Rob Harris, P. O. Box 11532, Green Bay, Wisconsin, 54307, completed filing an application with the Department of Natural Resources (the Department) for a permit under Wis. Stat. § 30.12, to place a water-ski jump and two performance platforms on the bed of the Fox River, Village of Wrightstown, Brown County. The Department and the co-applicants have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.
- 2. Brown County Parks is a co-applicant on the permit application. Brown County owns real property located in the NE ¼, NW ¼, in Section 2, Township 21 North, Range 19 East, Brown County. The above-described property abuts the Fox River, which is navigable in fact at the project site. The County owns approximately 1000 feet of frontage along the Fox River. The County has a contract with the ski team that seeks to exempt County taxpayers from liability for accidents relating to the ski show.
- 3. The purpose of placing the proposed structures is to engage in water-ski shows performed for members of the public at Wrightstown Park. The show uses approximately 300 feet of the river frontage on the western end of the park. The Waterboard Warriors, a competitive water ski team associated with a Boy Scout Explorer Troop, present a popular water-ski show that is attended by hundreds of spectators during the summer months. During the 2000 boating season, the team presented two shows per week. The shows consist of up to 12 or 13 acts, and include skiers ranging in age from 6 to their mid-40's.

- 4. The co-applicants propose to install a water-ski jump and two large pier structure platforms below the ordinary high way mark (OHWM) on the western edge of Wrightstown Park adjacent to the Fox River. The main performance platform is 20 feet eight inches wide and 32 feet 2 inches long. The piers are attached to the shore by two wide legs, resulting in three sides of the water being enclosed by the pier and the fourth made inaccessible to the public by the shoreline. (Rosenberger) No boats can gain access to the shoreline given this configuration. The main performance platform does not meet the standards described in Wis. Admin. Code NR 326.04(4), because it totally encloses a portion of the waterway. (Id.) Accordingly, this portion of the permit application must be denied as a matter of law.
- 5. The second platform is used primarily for skiers leaving the river at the end of their performance. ("the landing platform") It is 50 feet wide and 26 feet long, as large as a small ranch house. (Rosenberger) The landing platform is excessively large and blocks off a massive area of the shoreline. No light can penetrate below this structure, and the public is unable to use any part of this area of the river. (Id.) Placement of this platform has the effect of covering and blocking off a large area of the public waters of the Fox River from other users. The landing platform is much larger than the DNR Program Guidance threshold for water ski shows. (Garbisch) The landing platform exceeds a reasonable use of the shoreline and would be detrimental to the public interest in the Fox River.
- 6. The performance platform and landing platform would have a detrimental impact upon the public interest in preserving natural scenic beauty. (Garbisch) The area around the proposed placement consists of a scenic, natural appearing shoreline. (Ex. 21 A-B) The upland is a grassy, tree-lined park. Both platforms are currently covered with blue indoor-outdoor carpeting. The impact on natural scenic beauty could be mitigated to an acceptable extent if the carpeting color were changed to better blend with the shoreline. (Garbisch)
- 7. The applicants have demonstrated that a second platform of some kind is needed for the safety of skiers at this location. Without some kind of landing platform, the rocky shoreline would be dangerous for skiers, especially children, ending their ski-show at a high rate of speed. However, the existing landing platform must be modified, given its grossly excessive size.
- 8. The proposed platform structures will materially obstruct existing navigation on the Fox River and will be detrimental to the public interest. The proposed ski jump will not materially obstruct navigation and will not be detrimental to the public interest if placed in accordance with conditions set forth below.
- 9. The ski jump is 14 feet wide by 20 feet long. The jump would be placed approximately 150 feet below the existing shoreline at Wrightstown Park. It would extend from two feet below to five feet above the water surface. There was no significant objection to the permit for the water-ski jump. The ski jump comports with the DNR guidance relating to structures placed by ski shows. It is accordingly approved, subject to the conditions set forth below.

- 10. Several neighboring riparians testified that the shows and practices disrupted their quiet enjoyment of the river. In particular, during the last season, the loudspeakers were positioned in a manner that created excessive noise directly across the lake. The team admits that the loudspeaker placed near platform #3 should be re-positioned and the volume reduced. Beyond the noise factor, there is no question that the water ski show dominates this stretch of waterway during the summer months. In addition to the 2 weekly shows, the skiers practice 3 or 4 nights per week. Some restrictions on the hours of use of the platforms would be consistent with the public interest in keeping the Fox River open to various user groups. A single user group should not be able to monopolize public waters for five or six nights per week during the boating season.
- 11. The co-applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.
- 12. The proposed structures will not reduce the effective flood flow capacity of the Fox River upon compliance with the conditions in the permit.
- 13. The proposed structures will not adversely affect water quality and increase water pollution in the Fox River. The platform structures will not cause environmental pollution as defined in Wis. Stat. § 281.01(10), if the structures are built and maintained in accordance with this permit.

DISCUSSION

The Waterboard Warriors have used the two platforms in dispute for several years. However, they previously placed these structures near the DePere fairgrounds in an area behind a lawfully established bulkhead line, which meant that no permit or size restrictions were necessary. The new location, adjacent to Wrightstown Park, is not behind a bulkhead line and the structures must accordingly meet statutory and administrative code requirements prior to placement. Unfortunately for the Warriors, neither the performance platform nor the landing platform meets these standards.

The performance platform totally encloses an area of a public waterway and does not meet the standards set forth in Wis. Admin. Code § NR 326.04(4). This platform must be redesigned to allow for access to the water in the area behind the pier.

Further, both structures are excessive in size. Most piers in public waters are limited to six feet in width. The state legislature has recognized the value of competitive water-ski shows, and has, suggested, without giving a particular standard, that these users be allowed a larger structure to accommodate them. The DNR has begun to craft Program Guidance as to the expected reasonable use needs of such shows. A 1995 Guidance referenced a starting dock of no more than 12 feet by 24 feet long. (Ex. 17) A more recent formulation contemplates a performance platform of up to 20 feet wide by 36 feet long. (Garbisch) Clearly the landing

platform, at 50 feet wide by 26 feet long, grossly exceeds the starting point of reasonable use of shoreline by a water-ski show.

The Guidance document also contemplates placement of only one structure, not two. However, the Waterboard Warriors demonstrated that pursuing the show at this location would be dangerous, especially to young children, given the rocky shoreline in the area. Further, there are no other sites available in the area. Under these unique circumstances, it may be appropriate to place two structures so long as they are significantly reduced in size. Any landing platform should be smaller than the performance platform.

CONCLUSIONS OF LAW

- 1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b), and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
 - 2. The co-applicants are riparian owners within the meaning of Wis. Stat. § 30.12.
- 3. The proposed structures described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.
- 4. A permit application is required for this project because the platform and jump interfere with public rights in navigable waters within the meaning of Wis. Stat. § 30.135(1)(a)(1).
- 5. The proposed "performance" platform does not meet the pier standards described at Wis. Admin. Code NR 326.04(4) because it totally encloses an area of the Fox River.
- 6. The rights of a riparian must be balanced with the public rights in the navigable waters of the state. A riparian's use of a riparian property must be "reasonable." The two platforms grossly exceed in size the reasonable use of the riparian property at this location. *Sterlingworth Condominium Assoc. v. DNR*, 205 Wis. 2d 710, 721-722, 556 N.W.2d 791 (Wis. Ct. App. 1996) In determining "reasonable use" it is appropriate to consider Department Program Guidance. (Id.)
- 7. The DNR must consider the "cumulative impact" of many small structures as a whole in carrying out its legislatively assigned duty in protecting the navigable waters of the state. *Sterlingworth*, Id., at pp. 721-722 Accord: *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966). If many large areas of light are blocked out on public waters, there would be detrimental cumulative impact on public waters.
- 8. The proposed ski jump will not be "detrimental to the public interest" in the Fox River within the meaning of Wis. Stat. § 30.12(2) if placed in accordance with the permit set forth below.

- 9. The proposed platforms would be "detrimental to the public interest" in the Fox River within the meaning of Wis. Stat. § 30.12(2).
 - 10. The project is a type III action under Wis. Admin. Code § NR 150.03.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the co-applicants, a permit under Wis. Stat. § 30.12, for the construction of a structure as described in the foregoing Findings of Fact, limited to the ski jump, subject, however, to the conditions that:

- 1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or becomes detrimental to the public interest.
- 2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
- 3. A copy of this permit shall be kept at the site at all times during the construction or placement of the structure.
- 4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
- 5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
- 6. The permittee shall notify the Water Management Specialist, Shelly Garbisch, not less than 5 working days before starting placement and again not more than 5 days after the project has been completed.
- 7. The ski jump shall be properly lit. The ski jump must be lit from dusk to dawn with white lights visible to approaching boats at all 360 degrees. The permittee shall submit a lighting plan acceptable to the Department prior to placement of the ski-jump.
 - 8. The ski jump shall be removed seasonally.
 - 9. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact, and is limited to placement of a ski-jump.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permits for the proposed platforms be DENIED.

IT IS FURTHER ORDERED, that the permit for the ski jump be conditionally granted as set forth above.

Dated at Madison, Wisconsin on June 28, 2001.

STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS 5005 University Avenue, Suite 201 Madison, Wisconsin 53705 Telephone: (608) 266-7709 FAX: (608) 264-9885

Administrative Law Judge

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

- 1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
- 2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
- 3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. § 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.